ROSMAN @ OSMAN BIN HAJI ABDUL RASHID

v.

ROSMAH BEGUM BT. BAHADUR BEG

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 11-10-92 (91)]
1 DECEMBER 1992

LANDLORD AND TENANT: Claim for vacant possession - Notice to quit - Effect of notice to quit - Whether notice to quit and to deliver vacant possession bad in law - Whether ownership of premises changed hands - Whether appellant/plaintiff is legal owner of premises - Defendant as occupier of premises denies title of appellant as landlord - Whether tenant could deny title of his landlord after termination of tenancy - Section 116 Evidence Act 1950 - Estoppel - Whether occupier acquired tenancy coupled with equity.

EVIDENCE: Conflicting version between two parties to the suit - Directly contradictory versions - Finding of fact by trial Court - Function of appellate Court - Whether finding of fact should be disturbed by appellate Court.

This was an appeal by the plaintiff against the decision of the Magistrate's Court, Parit Buntar which dismissed his claim for delivery of vacant possession of an unnumbered house and for damages for trespass.

Held:

[1] The role of the appellate Court is clear, that is, the appellate Court has to accord to the findings of fact of the trial Court the greatest respect and ought not to disturb them unless it is satisfied that the trial Court had reached a wrong decision.

[2] The trial Magistrate, having seen and heard the witnesses, made a specific finding of fact that the appellant/plaintiff was not the true owner of the premises in question. The trial Magistrate was plainly not wrong in coming to the conclusions as he did on the evidence before him.

[Appeal dismissed with costs. Each party to pay his/her own costs].

Cases referred to:

Hirabai's case [1955] AIR Nagpur 234 ***(refd)***
Bhaiganti Bewa v. Himmat [1917] AIR Cal 498 ***(refd)***
Mt. Bilas Kunwar v. Desraj Ranjit Singh [1915] AIR PC 96 ***(refd)***
Annamalai Chettiar's case [1970] AIR 57 Mad. ***(refd)***
Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. [1980] 1 MLJ 23 FC ***(refd)***
Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 157 FC ***(refd)***
Fatimah v. Moideen Kutty [1969] 1 MLJ 72 ***(cit)***
Ramsden v. Dyson [1866-67] LR 1 HL 129 ***(refd)***
Inwards v. Baker [1965] 1 All ER 446 ***(refd)***
Teo Ai Choo v. Leong Sze Hian [1986] 2 MLJ 331 ***(cit)***
Powell and wife v. Streatham Manor Nursing Home [1935] AC 243 ***(foll)***
Tan Tek Yan v. Samuel [1964] MLJ 283 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 116
Evidence Act, s. 116 (India)

For the plaintiff - V. Muthusamy; M/s. V. Muthusamy & Co.
For the defendant - Anne Goh; M/s. Chen Leong & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

The appellant/plaintiff sued the respondent/defendant in the Magistrate's Court, Parit Buntar for delivery of vacant possession of an unnumbered house erected on Lot 1395, Simpang Tiga, Parit Buntar, Kerian, Perak ("the said land") together with damages for trespass. The learned Magistrate who heard the case gave judgment in favour of the respondent/defendant. The appellant/plaintiff being dissatisfied appealed against the whole decision of the learned Magistrate.

The facts of the case are as follows. According to the appellant/plaintiff, in 1954 he built with the consent of Pakriasamy a/l Thendayuthepane (PW2) ("the land owner") an unnumbered house on the said land after the relevant plan had been signed by the landowner and approved by the Kerian Town Board (see exhibit P1). A certificate of fitness for occupation of the unnumbered house was issued to the appellant/plaintiff by the Chairman of the Kerian Town Board wherein it was certified that the building was fit for occupation with effect from 14 February 1955 (see exhibit P2). It was alleged that the appellant/plaintiff rented the said land from the land owner and paid him ground rent of RM3 per month. Thereafter the appellant/plaintiff stayed with his family in the unnumbered house for a period of 12 years. In 1965 the appellant/plaintiff and his family moved to Penang and the

unnumbered house was occupied by his in-laws, who then took charge of the affairs of the unnumbered house. According to the appellant/plaintiff, in 1974 on invitation of his in laws the respondent/defendant stayed temporarily in the unnumbered house with her husband and children while waiting for their house (respondent/defendant) in Kuala Lumpur to be ready. At that time the appellant/plaintiff did not object. Upon the death of his in laws, the respondent/defendant continued to stay in the unnumbered house till today.

On the other hand the respondent/defendant stated that she stayed in the unnumbered house when it was first built together with her husband, her two children and with both of her parents. And that the appellant/plaintiff and his wife (PW3) stayed in the unnumbered house since their marriage until the unnumbered house was almost auctioned off (this was due to the indebtedness of the appellant/plaintiff). She stated that she located the said land belonging to the landowner before the unnumbered house was built by the appellant and her mother, Zainab binti Hj. Abdul Rahman ("Zainab"). And that the appellant/plaintiff and Zainab shared equally in building the unnumbered house.

It is pertinent to point out that the parties are related to one another. The appellant/plaintiff is the brother in law of the respondent/defendant.

It transpired that on 19 December 1955 the appellant/plaintiff as transferor entered into an agreement (exhibit D5) with Zainab as transferee (the mother in law of the appellant/plaintiff and the maternal mother of both the respondent/defendant and (PW3)) and with S. Syed Ahamed s/o Shaik Mohamed ("DW2") as purchaser of the unnumbered house. By virtue of this agreement the appellant/plaintiff transferred the unnumbered house on 16 September 1955 to Zainab. Since the unnumbered house was subject to a warrant of attachment *vide* Ipoh Civil Suit No. 100 of 1955 wherein the appellant/plaintiff was ordered to pay Lee Hock Seng the sum of RM3,686.70 and in order to overcome this problem both the appellant/plaintiff and Zainab being desirous of avoiding the warrant of attachment sought the help of DW2 to settle the debt to Lee Hock Seng. DW2 settled the debt to Lee Hock Seng by forwarding a sum of RM4,250 to a chinese lawyer in Taiping. This was in the form of a loan. In return both the appellant/plaintiff and Zainab agreed to transfer the unnumbered house to DW2 and to pay rent of RM60 to DW2. According to DW2, Zainab, appellant/plaintiff and his wife together with the respondent/defendant stayed in the unnumbered house. The rent of RM60 was paid by Zainab or the respondent/defendant. The appellant/plaintiff never paid the rent since he was unemployed. The loan was totally repaid by Zainab and the respondent/defendant on instalments for a period of two years. According to DW2 after the loan had been repaid in 1957, the unnumbered house was surrendered to Zainab by way of an agreement. Unfortunately the agreement was missing.

Later Zainab and her husband died (the date unknown as no evidence was led in the Magistrate's Court). The unnumbered house was occupied by the respondent/defendant and her family till today. During the duration of the respondent/defendant's stay (together with her husband and children) at the unnumbered house, the ground rents were paid by her (respondent/defendant) (see receipts dated 30 November 1976 (two copies), 5 April 1977, 30 April 1978 (two copies), 5 March 1979, 13 February 1980 (two copies), 24 October 1981 and 31 July 1980 (two copies) - (exhibits D6A-K). The electricity bill (exhibit D7) in the name of the respondent/defendant was also paid by her (respondent/defendant).

The appellant/plaintiff through his solicitors by letter dated 13 April 1987 served a notice for vacant possession of the unnumbered house to the respondent/defendant (see exhibit P3). By this notice the respondent/defendant who was described as a licensee was alleged to have failed to pay house rent and was required to vacate by 31 May 1987. The respondent/defendant admitted receiving the said notice.

There are two major issues in this appeal. Firstly, whether the notice to quit and to deliver vacant possession as per exhibit P3 dated 13 April 1987 was bad in law and therefore it had no effect to terminate the respondent/defendant's tenancy. Secondly, whether in the circumstances of this case the respondent/defendant's tenancy was coupled with an equity which could not be determined by a bare notice to quit and to deliver vacant possession.

In regard to the first issue, Counsel for the appellant/plaintiff contended that the notice to quit (exhibit P3) was good in law as the

unnumbered house was owned and built by the appellant/plaintiff. In rebuttal, Counsel for the respondent/defendant contended that the notice to quit was bad in law in that the appellant/plaintiff was no longer the owner of the unnumbered house and therefore not entitled to evict the respondent/plaintiff. For convenience the notice to quit is reproduced below:

VM/PB/LT/61/84 13 April 1987

Berdaftar AR

Rosimah Begum Binti Bahadur Beg,
Rumah di atas Lot No: 1395,
Section Simpang Tiga,
34200 Parit Buntar,
Perak.

Notis Pindah

Re: Rumah di atas Lot No. 1395 Section Simpang Tiga, Parit Buntar, Perak.

Kami mewakili Encik Rosman alias Osman bin Haji Abdul Rashid, tuanpunya rumah yang tersebut di atas dimana rumah tersebut tidak tertakluk di bawah Ordinan Pengawal Sewaan 1966.

Kami diarah untuk memberi Notis Pindah dan mengosongkan rumah yang dibina oleh puan sebagai Licensee tanpa bayaran sewa rumah kepada pelanggan kami pada 31 Mei 1987.

Sila Ambil Perhatian jikalau puan gagal dan enggan mematohi notis ini dalam jangka masa yang diberikan maka kami mendapat arahan daripada pelanggan kami untuk mengambil tindakan Mahkamah untuk menghalau puan dari rumah tersebut di atas tanpa rujukan puan lagi.

Tarikh 13 April 1987.

t.t.
Peguambela & Peguamcara

s.k.
Encik Rosman alias Osman bin
Haji Abdul Rashid
d/a Cik Laila binti Bahadur Beg
2K Jalan Sungai Nibong,
11900 Bayan Lepas
Pulau Pinang.

It is not in dispute that the landowner of the said land (at the material time) wherein the unnumbered house was built was Pakriasamy a/l Thendayuthepane (PW2). The landowner owned the said land from 1954 till October 1981 when it was sold to a developer. It is said that the appellant/plaintiff built the unnumbered house after obtaining the relevant approval from the chairman of the Kerian Town Board and paid ground rent at RM3 to the landowner per month. But the notice to quit describes the respondent/defendant as the person who built the unnumbered house and held it as a licensee (rumah yang dibina oleh puan sebagai licensee). It is also not in dispute that the appellant/plaintiff fell into financial difficulty (it was said by the appellant/plaintiff's wife (PW3) that the cost of building the unnumbered house had caused hardship to her husband) and consequently Lee Hock Seng instituted a warrant of attachment of movable property in order to recover RM3,686.70 *vide* Ipoh Civil Suit No. 100 of 1955. Being alarmed at this turn of event, an agreement dated 19 December 1955 (exhibit D5) was entered into between three parties. By this agreement (exhibit D5) the unnumbered house was transferred to Zainab and DW2 became the purchaser of the unnumbered house for the sum of RM4,250. Since the sum of RM4,250 was repaid to DW2 by Zainab and the respondent/defendant on instalment basis for a period of 2 years and the ground rents were also paid by the respondent/defendant (see exhibits D6A to K), it was submitted (by the learned Counsel for the respondent/defendant) that the notice to quit was bad in law. By 19 December 1955 the ownership of the unnumbered house has changed hands. It was no longer with the appellant/plaintiff. Therefore the appellant/plaintiff was not entitled to evict the respondent/defendant.

It was contended by the learned Counsel for the appellant/plaintiff that the respondent/defendant as tenant was estopped by s. 116 of the Evidence Act 1950 from denying her landlord's title (in this case the landlord being the appellant/plaintiff). Section 116 Evidence Act 1950 reads thus:

> No tenant of immovable property ... shall during the continuance of the tenancy be permitted to deny that the landlord ... had at the beginning of the tenancy a title to the immovable property; ...

In *Hirabai's* case [1955] AIR Nagpur 234, the question posed for decision was whether a tenant could deny the title of his landlord after the termination of the tenancy. The Court in delivering its judgment quoted with approval the following passage by Mooker J in *Bhaiganti Bewa v. Himmat* [1917] AIR Cal 498:

> Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two

conditions then are essential to the existence of the estoppel, first, possession, secondly permission; and when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues.

Again the Court in delivering its judgment referred to a decision of the Privy Council in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* [1915] AIR PC 96 and said:

> In [that case], the suit was brought for possession by a landlord against the tenant who refused to deliver possession after a notice to quit. Their lordships observed: "... a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. ... The fact that in the present case the tenancy came to an end by reason of forfeiture and the landlord served a notice asking the tenants to vacate the house did not make any difference to the applicability of the rule of estoppel which is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord.

Thus the Court in *Hirabai's* case held that a tenant could not deny the title of his landlord after the termination of the tenancy for so long as the tenant remained in possession.

Next, is *Annamalai Chettiar's* case [1970] AIR 57 Mad. where it was stated that:

> Section 116 of the Evidence Act clearly says that the tenant is estopped from denying, during the continuation of the tenancy, that the landlord had title at the commencement of the tenancy. Possession and permission being established, estoppel would bind the tenant during the continuation of tenancy and until he surrenders his possession ... The estoppel contemplated by s. 116 of the Indian Act is, as I have observed, restricted to the denial of title at the commencement of the tenancy and by implication, it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end.

Nearer home is the case of *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.* [1980] 1 MLJ 23 FC where Raja Azlan Shah Ag. CJ (Malaya) (as his Majesty then was) said:

> Now s. 116 of the Evidence Act enacts that no tenant of immovable property shall, during the continuance of the tenancy be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. The words "during the continuance of the tenancy" are important and make it clear that where there is no legal tenancy, the provisions of the section are not applicable. That being so, where the contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. The tenant in consequence can later challenge the status of the landlord, and he cannot be deemed to be estopped from denying that the title of the landlord has come to an end. We are of the view that the decision in *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156 is now no longer good law.

In *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 157 FC Hashim Yeop Sani FJ (as he then was) in a supporting judgment said:

> A tenant cannot deny that the person by whom he is let into possession had title at that time, but he may shew that subsequently such title is determined by transfer or otherwise. This rule which has been well established in many English cases was adopted by this Court in *Fatimah v. Moideen Kutty* [1969] 1 MLJ 72.

In *Fatimah v. Moideen Kutty, supra,* it was held that not withstanding the doctrine of estoppel a tenant may plead that the title of the landlord has come to an end.

It must be borne in mind that the relationship of landlord and tenant can be created only by a contract, valid and legal according to the law subsisting at the time of its execution. The question to be considered in the instant appeal is this: What was the relationship of the appellant/plaintiff and the respondent/defendant after 19 December 1955? From the available evidence the ownership of the unnumbered house has changed hands - from the appellant/plaintiff (I wholeheartedly agree with the learned Magistrate that the unnumbered house was built and owned before 19 December 1955 by the appellant/plaintiff) to the transferee (Zainab) and then to the purchaser, DW2. The latter allowed the respondent/defendant to stay at the unnumbered house with her parents on payment of RM60 per month as rental and it was in evidence that the RM4,250 advanced by DW2 to settle the debt of the appellant/plaintiff to Lee Hock Seng was repaid by Zainab and the respondent/defendant. There was no legal tenancy between the appellant/plaintiff and the

respondent/defendant. Therefore there can never be any question of the continuance of the tenancy as envisaged in s. 116 of the Evidence Act. Consequently, the respondent/defendant rightly challenged the status of the appellant/plaintiff and he (respondent/defendant) cannot be deemed to be estopped from denying that the title of the landlord (appellant/plaintiff) has ended. In that event, the notice to evict was bad in law and the appellant/plaintiff not entitled to evict the respondent/defendant from the unnumbered house.

Even if I am wrong in that the notice to evict was good in law, there is another hurdle to overcome and that is: whether there was a tenancy coupled with equity vested in the respondent/defendant?

The principle of equity or what is sometimes referred to as equitable estoppel was succinctly stated by Lord Kingsdown in *Ramsden v. Dyson* [1866-67] LR 1 HL 129, in particular at p. 170:

> The rule of law applicable to the case appears to me to be this: If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* 34 ER Chancery 341 and, as I conceive, is open to no doubt.

Lord Denning MR further explained and refined the principle of equitable estoppel in *Inwards v. Baker* [1965] 1 All ER 446 in particular at pp. 448/449:

> ... in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the Court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the Court will not allow that expectation to be defeated where it would be inequitable so to do ...

Reverting to the instant appeal, I have to examine the circumstances in order to see whether the respondent/defendant had acquired a tenancy coupled with equity. The notice to quit referred to earlier describes the respondent/defendant as a licensee. The fact that there was no written agreement between the appellant/plaintiff and the respondent/defendant is immaterial. Payment of ground rent by the respondent/defendant as per exhibits D6A to K is a clear indication that the respondent/defendant had a tenancy of the said land upon which the unnumbered house was built. No doubt the unnumbered house was built at the material time by the appellant/plaintiff, yet by virtue of the agreement as per exhibit D5 dated 19 December 1955 a new complexion was added, in that both Zainab and the respondent/defendant paid the loan advanced by DW2 in the sum of RM4,250 for two years on instalment basis and also paid RM60 rent to DW2 all with a view to help the appellant/plaintiff. There was therefore an expenditure of money by the respondent/defendant in order to prevent the unnumbered house from being auctioned by Lee Hock Seng. Here it must be borne in mind that DW2 was categorical in saying that the appellant/plaintiff being unemployed did not pay him a cent. It would not be incorrect to say that the respondent/defendant must be under an expectation of being allowed to stay in the unnumbered house. Thus equity would therefore come in aid of the respondent/defendant.

In the Court below, there were to some extent conflicting evidence. The appellant/plaintiff stated:

(1) that he occupied the unnumbered house since it was built in 1954 continuously for 12 years with his wife and children and his parents in law. Thereafter he went on transfer to Penang. The unnumbered house was occupied by his parents in law who in 1974 allowed the respondent/defendant to stay in the unnumbered house after her (respondent/defendant) husband had retired. In contrast the respondent/defendant stated that she occupied the unnumbered house from the time it was built.

(2) that he repaid DW2 one lump sum the amount advanced to Lee Hock Seng in order to settle the warrant of attachment *vide* Ipoh Civil Suit No. 100 of 1955. However, DW2 denied this totally and corroborated the evidence of the respondent/defendant that the latter was the one together with her mother (Zainab) who

repaid the loan on instalment basis for a period of 2 years and they also paid the monthly rentals of RM60 to DW2. DW2 also stated that the appellant/plaintiff did not pay a cent.

(3) that he paid the ground rent to the landowner. In contrast, under cross-examination the landowner made a startling statement that it was Zainab that paid the ground rent till 1981.

Now it has been said time and again, that where there were directly contradictory versions the acceptance or rejection of which significantly depended on the oral testimony of the protagonists, the role of the appellate Court is clear, that is, the appellate Court has to accord to the findings of fact of the trial Court the greatest respect and ought not to disturb them unless it is satisfied that the trial Court had reached a wrong decision. (See *Teo Ai Choo v. Leang Sze Hian* [1986] 2 MLJ 331). Having seen and heard the witnesses, the learned Magistrate in the Court below made a specific finding of fact, *viz*:

> Berdasarkan keterangan yang telah dikemukakan oleh kedua-dua pihak semasa perbicaraan, Mahkamah mendapati bahawa plaintif (appellant/plaintiff) bukanlah pemilik sebenar ke atas premis yang dipertikaikan.

There are established principles which an appellate Court should follow in reviewing the findings of the trial Magistrate. Lord Wright in the case of *Powell and wife v. Streatham Manor Nursing Home* [1935] AC 243 said:

> Two principles are beyond controversy. First, it is clear that in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. And secondly, the Court of Appeal has no right to ignore what facts the Judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing.

In *Tan Tek Yan v. Samuel* [1964] MLJ 283 Wee Chong Jin CJ said:

> It has been laid down on numerous occasions that an appellate Court even though it is disposed to come to a different conclusion on the printed evidence will not upset the finding of a trial Judge on a question of fact which turned solely on the credibility of witnesses, unless it is satisfied that the trial Judge was plainly wrong.

Applying the aforesaid principles to the instant appeal, I am not satisfied that the trial Magistrate was plainly wrong in coming to the conclusions as he did on the evidence before him.

The appeal is hereby dismissed. However, having regard to the circumstances of this case, I order that each party to pay his/her own costs here and in the Court below.